PRISM LEISURE SDN BHD

v.

LUMUT MARINE RESORT BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S1-S5-22-451-96]
31 JANUARY 2002

CONTRACT: *Formation - Concluded contract - Whether there was a valid, legal and binding contract - Factors to be considered - Conduct of the parties - Execution of a formal agreement - Whether only a mere formality - Whether defendant liable*

The defendant owned and operated a proprietary club known as the Lumut International Yatch Club (LIYC). The defendant by a letter dated 4 October 1995 offered the plaintiff a concessionaire to operate the water based and marina facilities at the LIYC. The plaintiff accepted the defendant's offer by a letter dated 5 October 1995 and moved its employees into the premises of the LIYC belonging to the defendant and commenced operations. The parties had agreed that in pursuance of the contract, a formal agreement will be signed between the parties containing, *inter alia*, the terms as set out in the letter of offer.

On 26 February 1996 the plaintiff received a draft formal agreement from the defendant which included apart from the terms contained in the letter of offer several new conditions which were never previously raised nor agreed upon by the plaintiff. The plaintiff was unhappy and requested for further time to study the draft formal agreement. The defendant responded that the defendant would not be signing the formal agreement and that the plaintiff was given notice to vacate the LIYC grounds. The plaintiff's workers were then harassed to leave the defendant's premises and the plaintiff through its workers were prevented from carrying out their duties and obligations that arose under the two documents.

The issue that arose before the court was whether there was a valid, legal and binding contract existing between the parties.

Held:

[1] The execution of a formal agreement would only amount to a mere formality based on the conduct of the parties pursuant to the exchange of the two documents between the parties and the fact that the contract had already become an executed contract by the conduct of the parties. (p. 430 b-c)

[2] There was a valid, legal and binding contract in existence between the parties and it was the defendant who had breached that concluded contract. Bargains between the parties should be upheld and not be struck down. The defendant should be held liable to the plaintiff under the terms of the concluded contract as seen in the letter of offer and the letter of acceptance. (p 434 c-d)

[Judgment for the plaintiff.]

Case(s) referred to:

Aitken Agencies Ltd v. Richardson [1967] NZLR 65 ***(refd)***

Alexander Brogden And Others v. The Directors, & c, Of The Metropolitan Railway Company [1877] 2 AC 666 ***(refd)***

Allied Marine Transport Ltd v. Vale do Rio Doce Navegacao SA (The Leonidas D) [1985] 1 WLR 925 ***(refd)***

Art-Is At Work Sdn Bhd v. Sony Music Entertainment (M) Sdn Bhd [2000] 5 CLJ 559 ***(refd)***

Ashby v. White [1703] 2 Ld Raym 938 ***(refd)***

Ateni Maritime Corp v. Great Marine Ltd (The Great Marine) (No 2) [1990] 2 Lloyd's Rep 250 ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(refd)***

Barker v. The Queen [1983] 153 CLR 338 ***(refd)***

Best's Case [1865] 2 DJ & S 650 ***(refd)***

Brightside Co-operative Society v. Phillips [1964] 1 WLR 185 ***(refd)***

British Bank For Foreign Trade, Ltd v. Novimex, Ltd [1949] 1 All ER 155 ***(refd)***

Butler v. Machine Tool Co Ltd v. Ex-Cell-O Corp (England) Ltd [1979] 1 WLR 401 ***(refd)***

Chamber Colliery Co v. Twyerould [1915] 1 Ch 268 ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 ***(refd)***

Clayton v. Le Roy [1911] 2 KB 1031 ***(refd)***

Clipper Maritime Ltd v. Shirlstar Container Transport Ltd (The Anemone) [1987] 1 Lloyd's Rep 547 ***(refd)***

Clive v. Beaumont [1847] 1 De G & Sm 397 ***(refd)***

Conway v. Wimpey & Co (No 2) [1951] 2 KB 266 ***(refd)***

Corbett v. Hill [1870] LR Eq 671 ***(refd)***

CPR v. Gaud [1949] 2 KB 239 ***(refd)***

Cullen v. Rice [1981] 120 DLR (3d) 641 ***(refd)***

Damon Cie Naviera SA v. Hapag-Lloyd International SA (The Blankenstein) [1985] 1 WLR 435 ***(refd)***

East Ham Corporation v. Sunley [1965] 1 WLR 30 ***(refd)***

Elias v. George Sahely & Co (Barbados) Ltd [1982] 2 All ER 801 ***(refd)***

Entick v. Carrington [1765] 19 St Tr 1029 ***(refd)***

ER Ives Investments Ltd v. High [1967] 2 QB 379 ***(refd)***

Ex p Stark [1897] 1 Ch 575 ***(refd)***

Filby v. Hounsell [1896] 2 Ch 737 ***(refd)***

Hillas & Co, Ltd v. Arcos, Ltd [1932] All ER (Rep) 494 ***(refd)***
Hiort v. L & NWR. [1879] 4 Ex D 188 ***(refd)***
Holwell Securities Ltd v. Hughes [1974] 1 WLR 155 ***(refd)***
Hume v. Rundell [1824] 2 S & S 174 ***(refd)***
Jackson v. Turquand [1869] LR 4 HL 305 ***(refd)***
Jayaar Impex Ltd v. Toaken Group Ltd [1996] 2 Lloyd's Rep 437 ***(refd)***
Kennedy v. Thomassen [1929] 1 Ch 426 ***(refd)***
Kuwait Airways v. Iraqi Airways Co [1999] CLC 31 ***(refd)***
Kwek Seow Kee & Anor v. KT Packaging Sdn Bhd (No 1) [1998] 2 CLJ Supp 472 ***(refd)***
Lord Advocate v. Young [1887] 12 App Cas 544 ***(refd)***
Love And Stewart (Limited) v. S Instone And Co (Limited) [1917] 33 TLR 475 ***(refd)***
Malcolm v. Chancellor, Masters and Scholars of the University of Oxford, The Times, 19 December 1990 ***(refd)***
Masters And Another v. Cameron [1954] 91 CLR (Commonwealth Law Reports) 353 ***(refd)***
Mc Iver v. Richardson [1813] 1 M & S 557 ***(refd)***
Mozley v. Tinkler [1835] 1 CM & R 692 ***(refd)***
NE Ry v. Hastings [1900] AC 260 ***(refd)***
North West Leicestershire DC v. East Midlands Housing Association [1981] 1 WLR 1396 ***(refd)***
Northland Aircraft Ltd v. Dennis Ferranti Meters Ltd [1970] 114 SJ 845 ***(refd)***
Preston Corporation Sdn Bhd v. Edward Leong & Ors [1982] 2 MLJ 22 ***(refd)***
Rossiter v. Miller [1878] 3 App Cas 1124 ***(refd)***
Sanderson v. Marsden and Jones [1922] 10 LIL Rep 467 ***(refd)***
Simpson v. Hughes [1897] 66 LJ Ch 334 ***(refd)***
Smit International Singapore Pte Ltd v. Kurnia Dewi Shipping SA (The Kurnia Dewi) [1997] 1 Lloyd's Rep 553 ***(refd)***
Smith v. Hughes [1861-73] All ER Rep 632 ***(refd)***
Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611 ***(refd)***
Storer v. Manchester CC [1974] 1 WLR 1403 ***(refd)***
Sweet and Maxwell Ltd v. Universal News Services Ltd [1964] 2 QB 699 ***(refd)***
Tweddell v. Henderson [1975] 1 WLR 1496 ***(refd)***
Vitol BV (formerly T/A Vitol Trading BV) v. Compagnie Europeene Des Petroles [1988] Lloyd's Law Reports, Vol 1, 574 ***(refd)***
Willcox v. Kettel [1937] 1 All ER 222 ***(refd)***
Winterbourne v. Morgan [1809] 11 East 395 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(h), 4(2), 10

For the plaintiff - Surendran Subramaniam (Ragu Sampasivam); M/s Suren & Ragu
For the defendant - Meera Shanmughanathan (Hayati Ibrahim); M/s PM Tan, Chan & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

The trial of this case proceeds on the issue of liability and the trial ends expeditiously.

Within a narrow compass, the facts may be stated as follows. The plaintiff is a private limited company incorporated in Malaysia and has an address for service in Kuala Lumpur. The defendant is said to be a company incorporated in Malaysia and has a registered address at Petaling Jaya, Selangor. The defendant operates and owns a proprietary club known as The Lumut International Yacht Club ("LIYC") which sits on a piece of land *vide* HS (D) Dgs 5933, No. P.T. 4182, Mukim Lumut, Daerah Manjung, Negeri Perak Darul Ridzuan. The defendant is the registered owner of the said land which is on a ninety-nine years lease. In LIYC the defendant offers a variety of water based and marina facilities. By letter dated 4 October 1995, the defendant offered the plaintiff a concessionaire to operate the water based and marina facilities at the LIYC. It is certainly ideal to reproduce that letter of offer which was marked as exh. "D 1" as seen at p. 19 to p. 21 of the bundle of documents in encl. 17 and that letter was worded in this way:

> THE ORIENT STAR
>
> RESORT - LUMUT
>
> 4 October 1995
>
> Mr Stephen C.H. Loh
> Executive Director
> PRISM LEISURE SDN. BHD.
> 111A, Jalan SS2/24
> 47300 Petaling Jaya
> Selangor Darul Ehsan
>
> Dear Sir,
>
> We are glad to inform that Prism has been chosen as the concessionaire to run the marinas and water based facilities at the Lumut International Yacht Club. A formal agreement will be signed between Prism, its directors and Lumut International Yacht Club in due course. However we would like to summarise the salient points that would contain in the agreement here and should there be any queries before the agreement is drafted, please feel free to contact the undersigned.

- Membership fees	: To be retained by Lumut International Yacht Club.	*a*
- Monthly subscriptions	: To be retained by Lumut International Yacht Club.	
- Payroll cost for running marinas and other waterbased facilities	: To be borne by Prism.	*b*
- Fees for mooring + yard services. 100% occupancy will bring in about RM13,000 per month	: To be split between Prism: Lumut International Yacht Club on 50% : 50% basis.	*c*
- Launching, towing + parking fees about RM3,000 per month	: To be split between Prism: Lumut International Yacht Club on 50% : 50% basis.	*d*
- Repair works charges	: Propose for Lumut International Yacht Club to have 20% surcharge.	
- Other Support facilities	: Propose for Lumut International Yacht Club to have 20% surcharge.	*e*
- Chartering	: Some vessels to be provided by Prism. However, preference would be given to the chartering of Lumut International Yacht Club's vessels.	*f*
- Chartering fees for vessels provide(d) by Prism	: To be split between Prism: Lumut International Yacht Club on 80% : 20% Basis.	*g*
- Some essential marina equipment	: To be provided by Prism.	
- Income guarantee	: RM5,000 per month after 3 months.	
- Ability to get sponsors for events organised	: Prism will be able to get strong sponsors to help finance these events.	*h*

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- Full bunkering costing from RM800,000 to 1 million	: Prism will get Petronas to provide Lumut International Yacht Club at no cost to Lumut International Yacht Club. I have checked with Shell and Esso and both have asked us to build first and then we could get them to part sponsor the costs. In return, we are to guarantee a minimum purchase per month. Petronas will not insist on a guarantee amount as per Prism.
- Experience at running marinas	: Prism will hire a consultant from Hong Kong to set up the operating system and procedures and provide the training.
- Sinking Fund for repairs of marinas and other waterbased facilities	: Prism has agreed to set aside 5% of all charges from mooring, boatyard and launching and retrieval services to be provided for the purposes of repairing these facilities. This sinking fund is non refundable.
- Showroom	: Prism has proposed to rent the space.

In the meantime, we would appreciate if the following information could be made available to us:

- Number of vessels Prism will be providing?
- List of equipment that Prism would require to run the marinas and broken down into those that would be provided by Prism and those that Lumut International Yacht Club would have to provide.
- C V of the Hong Kong consultant that Prism intended to engage.
- To help ensure that it would be a successful venture for Prism, we would also like to have a feasibility study of the venture from Prism. Should Prism need any assistance, we would be more than glad to help here.

With regards to the showroom area, kindly be informed that it may be redeveloped after a year but in any case we would give Prism 6 months notice to vacate should we so decide to redevelop the site.

Looking forward to a great working relationship and a successful venture.

Thank you.

Yours sincerely
Sgd. (Illegible).
Lim Say Chong
General Manager

The plaintiff quickly accepted the defendant's offer and transmitted its desire to accept the offer by a letter dated 5 October 1995 as seen in exh. "D2" of p. 22 to p. 23 of the bundle of documents in encl. 17. That letter of acceptance was phrased in this way:

PRISM LEISURE SDN. BHD.
11A, JALAN SS2/24, 47300 PETALING JAYA, SELANGOR DARUL EHSAN, MALAYSIA.
TEL:603-777 2788 FAX: 603-777 2588

5 October 1995

The General Manager,

Lumut International Yacht Club,
No: 6 Jalan Bersatu 13/4,
46200 Petaling Jaya,
Selangor D.E.

ATTENTION: MR. LIM SAY CHONG

Dear Mr. Lim,

RE: THE LUMUT INTERNATIONAL YACHT CLUB (LIYC)

Thank you very much for your letter of offer dated 4 October 1995 appointing us as Concessionaire to the Lumut International Yacht Club and Marina.

We hereby confirm our acceptance of the offer and our agreement in general to the terms as indicated therein. As with regards to the following subjects, we will revert to you accordingly.

1. Chartering services:

   Based on your conversation with our Michael Wan, we are in agreement to take over the maintenance of both the vessels that belong to the LIYC. The general maintenance cost(s) e.g. cleaning, and general upkeep will be borne by Prism and other maintenance which entails replacement of parts etc. shall be borne by LIYC. The fees collected from such chartering services will be split between Prism and LIYC, subject to final discussion and agreement.

2. Vessels from Prism:

   This is being finalised by us but we assure LIYC that we will have at least two crafts for a start, one 45 footer and one 27 footer. We will also be employing our own skipper.

3. List of Equipment Required:

   We will submit this list accordingly but in the meantime, the attached list is what we would require immediately from LIYC.

4. We propose to start up the operations of the Marina using our own format and system. This is currently being practiced by some of the Marinas in the country. Once operations start, and on the request of LIYC, we will finalise the professional services of a consultant.

In the meantime, please be advised that the person responsible for the operations in Lumut is Mr. A. Andrew and the personnel responsible for all operations matters will be Mr. Michael Wan and Mr. Ho Soo Peng. These personnel will be at your disposal at any time at your convenience.

We will now immediately mobilise ourselves in anticipation of the official launch of the Club. This mobilisation includes the hiring of suitable personnel as well as the purchase of various equipment for our operations. This would most certainly entail initial investment on our part.

We would like to immediately move into the Marina and start the operation. May we suggest that a meeting be called at your earliest convenience to be held at the Marina in order to authorise us to move into the Marina.

We look forward to your instructions soon.

Thank you and we certainly look forward to working closely with your organisation.

With best regards.

Yours faithfully,

PRISM LEISURE SDN BHD
Sgd. (Illegible).
STEPHEN C.H. LOH
Executive Director

c.c. Mohamed Shah bin Tan Sri Abdul Kadir
Chairman

The plaintiff says that by virtue of the letter of offer dated 4 October 1995 and the letter of acceptance dated 5 October 1995, a legal and binding contract had been entered into by the parties thereto. The defendant, on the other hand, says that there was no binding written contract between the parties since both the parties had not agreed on the terms of the contract.

On the strength of both the letter of offer and the letter of acceptance (hereinafter referred to as the "two documents"), the plaintiff and its employees moved into the premises of the LIYC belonging to the defendant and commenced operations on 4 October 1995. The parties had agreed that in pursuance of the contract, a formal agreement will be signed between the parties containing, *inter alia*, the terms as set out in the letter of offer. On 26 February 1996 the plaintiff received a draft formal agreement from the

defendant which was captioned as "services agreement" and this can be seen in exh. "D3" between p. 32 to p. 47 of the bundle of documents in encl. 17. That draft formal agreement in exh. "D3" included, apart from the terms contained in the letter of offer, several new conditions which were never raised in the letter of offer nor agreed upon by the plaintiff. The plaintiff was most unhappy with the draft formal agreement and by letter dated 9 May 1996 as reflected in "D18" of p. 63 of the bundle of documents in encl. 17, requested for further time to study the draft formal agreement. The letter in exh. "D18" was worded in this fashion:

> 9 May 1996
>
> The General Manager,
> (Properties and Hotels Division),
> Johan Holdings Berhad,
> 6, Jalan Bersatu (13/4),
> 46200 PETALING JAYA
>
> Attention: Mr. Lim Say Chong,
>
> Dear Sir,
>
> **RE: SERVICES AGREEMENT**
>
> We refer to the above matter.
>
> We are currently examining the various articles in the draft agreement and shall revert to you within the next seven (7) days.
>
> Thank you.
>
> Yours faithfully,
> PRISM LEISURE SDN. BHD.
>
> Sgd. (Illegible).
> MICHAEL WAN
> Operations Manager

The defendant responded and that response can be seen in a letter dated 10 May 1996 as seen in exh. "D5" which was in fact a letter from a company known as Johan Holdings Berhad. Exhibit "D5" conveyed the messages that the defendant would not be signing the formal agreement and that the plaintiff was given a week's notice to vacate the LIYC grounds and if the plaintiff failed to do so the plaintiff would be treated as a trespasser. In its original text, exh. "D5" was worded in this way:

Johan Holdings Berhad
Established 1920

TOSL/GC/0114/0596/LSC/ac

10th May 1996 **WITHOUT PREJUDICE**

Prism Leisure Sdn. Bhd.
111A Jalan SS 2/24
47300 Petaling Jaya
Selangor Darul Ehsan

Attn: En Mohd. Shah b Tan Sri Abdul Kadir

Dear Sir

RE: SERVICES AGREEMENT

It seems to me that Prism Leisure has no intention of providing me with the necessary information that is required for the agreement. This is despite me having chased for the information for almost 2 months. This agreement should have been endorsed by our two parties a couple of months back had the information that is required is given to me when requested. In view of the inaction on Prism's part, I regret to inform you that the Lumut International Yacht Club could not wait any longer and as such would not be signing the Service Agreement with Prism Leisure Sdn Bhd. Hence, I would like to give Prism Leisure a one week notice to move out of the LIYC grounds failing which Prism Leisure will be treated as having trespassed private property.

Yours faithfully
JOHAN HOLDINGS BERHAD

Sgd. (Illegible).
For
LIM SAY CHONG
General Manager

The defendant really meant business. By letter dated 18 May 1996, the defendant demanded the plaintiff to vacate the LIYC grounds by midnight of the same day - which was on 18 May 1996, as seen at exh. "D6" at p. 51 of the bundle of documents at encl. 17. Exhibit "D6" was drafted in this fashion:

Dear Sir,

Your staff are now trespassing the premises of the Lumut International Yacht Club. We would like to remind you of the notice of termination that was sent to your office by our representative Johan Holdings Berhad, dated 9 May 1996, giving 7 days notice for your company to clear the LIYC premise. Unless you clear the property by midnight 18 May 1996, we will proceed to make an official report with the authority and treat PRISM staff as trespassers.

From then onwards, things did not go on smoothly. On 19 May 1996, the plaintiff's workers were harassed to leave the defendant's premises and the plaintiff through its workers were prevented from carrying out their duties and obligations that arose under the two documents. On 20 May 1996, the defendant by itself, its agents, servants and/or employees prevented the plaintiff's employees from entering the defendant's land. On 28 July 1996, the defendant forcibly entered the plaintiff's office which was located on the defendant's premises and threw out the various equipment, items and movable properties of the plaintiff. Evidence was led to show that during the continuous period of 4 October 1995 up to 19 May 1996, the plaintiff had in pursuance of the contract proceeded to fulfil its duties and obligations thereunder and had expended and incurred expenses in the region of approximately RM782,542. The expenditure incurred were for the following portfolios:

(i) investment in equipment to operate the marina;

(ii) investment in equipment in preparation of the water based activities;

(iii) operation and trading costs for the marina; and

(iv) work that was carried out in the marina.

Trespass

The defendant took the stand that if the plaintiff failed to vacate the premises the plaintiff would be treated as a trespasser. That was indeed a serious stand to take. Trespass to land is a tort: *trespass quare clausum fregit*. It consists of the following acts (see *Barker v. The Queen* [1983] 153 CLR 338, 356):

(1) entering upon land in the possession of another;

(2) remaining upon such land; or

(3) placing or projecting any object upon such land. On the authority of *Ashby v. White* [1703] 2 Ld Raym 938, a trespass to land, just like all the other forms of trespass, is actionable per se without any proof of damage. Liability would definitely be strict. It has been said, time and again, that, "Every invasion of property, be it ever so minute, is a trespass" (*Entick v. Carrington* [1765] 19 St Tr 1029, 1066). It is wrong to assume that a man cannot be construed as a trespasser unless he knows he is one (*Conway v. Wimpey & Co (No 2)* [1951] 2 KB 266, 273).

There is another aspect of trespass that should be noted. It is this. That a person who has lawfully entered on a piece of land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the land is trespass (*CPR v. Gaud* [1949] 2 KB 239). It is a correct statement of the law to say that any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated be sued or ejected as a trespasser. After a lapse of reasonable time after a request to vacate proves futile and

the person fails to leave the premises, that would constitute trespass (*Cullen v. Rice* [1981] 120 DLR (3d) 641, 644). According to the case of *Winterbourne v. Morgan* [1809] 11 East 395, 405, a trespass by way of personal entry is a continuing injury and it will last so long as the personal presence of the wrong doer persists which will give rise to an action - *de die in diem* (so long as it lasts). It is germane to mention that he who owns or possesses the surface of land owns or possesses all the underlying strata thereto (*Corbett v. Hill* [1870] LR Eq 671, 673). Thus, any entry beneath the surface at whatever depth is an actionable trespass (*Willcox v. Kettel* [1937] 1 All ER 222 where the court held that an intrusion of concrete foundation by twenty inches a trespass).

So much for the law.

The Defendant's Stand

The defendant vehemently denied that there was ever any valid, legal and binding contract with the plaintiff and in reliance thereto the defendant stated that it was not liable to pay the plaintiff under the terms of the contract. The defendant too stated that it was not liable to pay for whatever services provided by the plaintiff and the defendant too refused to pay for any expenses incurred by the plaintiff in providing the services for a continuous period from 4 October 1995 to 19 May 1996.

Issue

It was quite apparent that there was only one issue to be decided by me and that was:

> Is there a valid, legal and binding contract existing between the parties?

This issue brings into sharp focus the meaning to be attached to the word "contract". What is a contract?, one may ask.

According to s. 2(h) of the Contracts Act 1950, "an agreement enforceable by law is a contract". Section 10 of the Contracts Act 1950 enacts as follows:

> (1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
>
> (2) Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

The *"Dictionary of Legal Terms"* by SL Salwan and U Narang published by the Academic (India) Publishers, New Delhi defines the word "Contract" as:

> A promise or set of promises for breach of which law gives a remedy or the performance of which the law in same way recognises as a duty; agreement

> which is intended to be enforceable at law. Contract is an agreement between competent parties, upon a lawful consideration, to do or to abstain from doing some act which is binding.

The expression "freedom of contract" means that the law does not restrict the terms on which the parties may contract. On the other end of the scale, the expression is also used in another sense in that a person is not by law compelled to enter into a contract. The ingredients of a valid, legal and binding contract have been set out in the case of *Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors* [1992] 1 CLJ 204; ([1992] 3 CLJ (Rep) 611) where VC George J (as he then was) said at p. 206 (at p. 614) of the report:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

That was a classic exposition of the law. An offer is an expression of one's willingness to enter into a contract on specified terms and that offer would be made with the intention that it is to become binding as soon as it is accepted by the other person to whom it is addressed to (*Storer v. Manchester CC* [1974] 1 WLR 1403). An acceptance is an expression of assent to the terms of an offer and it is usually final and unqualified. Simply put, an agreement is made when one party accepts an offer made by the other party. But an acceptance must always be unqualified. Thus, an offer to pay a fixed price for a building work is not construed to be accepted by a promise to do the work for a variable price (*North West Leicestershire DC v. East Midlands Housing Association* [1981] 1 WLR 1396). Likewise, an offer to supply goods is not accepted by an "order" for their "supply and installation" (*Butler v. Machine Tool Co Ltd v. Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401). The reply to an offer must be unqualified in that by that reply the offeree does not intend to introduce an entirely new term (*Jackson v. Turquand* [1869] LR 4 HL 305; and *Northland Aircraft Ltd v. Dennis Ferranti Meters Ltd* [1970] 114 SJ 845). It is interesting to note that according to *Clive v. Beaumont* [1847] 1 De G & Sm 397; *Simpson v. Hughes* [1897] 66 LJ Ch 334; and *Butler Machine Tool Co Ltd v. Ex-Cell-O Corp (England) Ltd (supra)* that statements which are not intended to add new terms do not vitiate the acceptance at all.

In *Preston Corporation Sdn Bhd v. Edward Leong & Ors* [1982] 2 MLJ 22 FC, Salleh Abas FJ delivering the judgment of the then Federal Court had this to say at p. 23 of the report:

> An offer is an intimation of willingness by an offeror to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offeror as soon as it has been accepted by the offeree.

and his Lordship continued to say at the next sentence:

> Yet an examination of all the quotations in this case did not seem to express such intention.

Of crucial importance, the issue surrounding this case centred on the two documents, namely, the letter of offer in exh. "D1" and the letter of acceptance in exh. "D2". It is the duty of this court to discover the intention of the parties in order to ascertain whether there was a valid, legal and binding contract in existence. Towards this end, solace may be found in the sage words of The Lord Chancellor (Lord Cairns) in the case of *Alexander Brogden And Others v. The Directors, & c., Of The Metropolitan Railway Company* [1877] 2 AC 666 (HL) where his Lordship aptly said at p. 672 of the report:

> My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form.

Of course, factually speaking the facts in *Alexander Brogden* were poles apart from the present case but the principles of law enunciated in that case were of universal application and would certainly apply to the facts of the present case. I would be forgiven if I were to briefly recite the facts of *Alexander Brogden*. In that case, Brogden had for some years supplied the Metropolitan Railway Company with coal. Later Brogden suggested that a contract be entered into between the parties. After a meeting between the agents of both Brogden and Metropolitan Railway Company, the terms of the agreement were drawn up by Metropolitan Railway Company's agent and it was then sent to Brogden. The latter upon receipt of the agreement proceeded to fill up certain parts of the agreement which had been left blank and introduced the name of the party who was to act as an arbitrator in case of dispute, and Brogden then wrote the word "approved" at the end of the document and signed his name thereto. Brogden's agent then returned the document to Metropolitan Railway

Company's agent who then put it in his desk and nothing further was done in the way of a formal execution of the document. As can be seen, the circumstances in regard to the conduct of both parties in *Alexander Brogden*'s case established a binding contract between them even though the agreement which was reduced into writing as a draft had not been formally executed by either party. Indeed this was the judgment of the House of Lords in *Alexander Brogden*'s case. The House of Lords too held that in such a case where the word "approved" was written by one of the parties at the end of the draft agreement it must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. The House of Lords also held that on these facts and the actual conduct of the parties established the existence of such a contract and since there had been a clear breach of it, Brogden must be held liable upon the contract.

It was sought to distinguish the facts in *Alexander Brogden* with the facts in the present case. Here, it was pointed out that the draft formal agreement that was extended to the plaintiff was not signed nor returned to the defendant. But as I said, the facts in Alexander Brogden can never be at par with that of the present case. No two cases can be the same. Be that as it may, it would be ideal to examine the issue of the day by examining the following crucial aspects of the case.

Construing The Two Documents

I was asked to construe the intentions of the parties by examining the letter of offer and the letter of acceptance. That would involve an exercise of construing the words employed in those letters. Justice Saville in *Vitol BV (formerly T/A Vitol Trading BV) v. Compagnie Europeene Des Petroles* [1988] Lloyd's Law Reports, vol. 1, 574, in the course of construing a contract for the sale of a quantity of crude oil by Vitol BV to Compagnie Europeene des Petroles had this to say at p. 576 of the report:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all, in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never really made an agreement at all, that is to

> say, had never truly agreed upon the vital terms of their bargain. In any of these cases, if it can be demonstrated that the parties were in fact agreed upon the terms of their bargain but by mistake wrote them down wrongly, then the law allows the contract to be rectified so as to accord with what was in fact agreed.

Of course, factually speaking, the facts in *Vitol*'s case are poles apart from the present case. In *Vitol*, the parties were not disputing the existence of an agreement and what was in dispute was the construction to be placed on certain clauses in the contract. In the present case, the issue was in regard as to whether there was a valid, legal and binding contract in existence between the parties? Nevertheless, the general principles of law propounded in *Vitol* would surely be applicable to the facts of the present case. Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 applied an objective test to construe the existence of a contract. There at p. 139 of the CLJ reporting, his Lordship had this to say:

> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
>
> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

Now, applying these general propositions of law, I must now highlight the relevant paragraphs in the letter of offer as well as the letter of acceptance in order to ascertain and determine the intentions of the parties. In the letter of offer, the first paragraph carries the following keywords:

> ... Prism has been chosen as the concessionaire to run the marinas and water based facilities at the Lumut International Yacht Club.

These words are certainly clear and unambiguous. It admits of only one sensible meaning: that the defendant has chosen the plaintiff as the concessionaire to run the marinas and water based facilities at the LIYC. The plaintiff responded and the keywords employed by the plaintiff were:

> Thank you very much for your letter of offer dated 4 October 1995 appointing us as concessionaire to the Lumut International Yacht Club and Marina.
>
> We hereby confirm our acceptance of the offer and our agreement in general to the terms as indicated therein.

These words in their natural and ordinary meaning admit of only one sensible meaning. It was this. That it was the intention of the plaintiff to thank the defendant for the letter of offer dated 4 October 1995 wherein the plaintiff was appointed as the concessionaire to the defendant's LIYC and by that letter too the plaintiff was communicating its acceptance of the defendant's offer.

The letter of offer also contains the following salient words:

> A formal agreement will be signed between Prism, its directors and Lumut International Yacht Club in due course.

which shows the intention of the defendant to execute a formal agreement in due course as confirmation of the concluded contract between the parties thereto. Emphasis ought to be placed on the words, "... in due course", which clearly show, in no uncertain terms, the intention of the defendant to subsequently formalise the concluded contract in future upon acceptance by the plaintiff of the offer from the defendant.

The letter of offer continues in this manner:

> However, we would like to summarise the salient points that would contain in the agreement here ...

and the natural and ordinary meaning to be attributable to these words would admit of only one sensible meaning and that would be that it was the intention of the defendant to incorporate the salient points that were alluded to in the letter of offer into the formal agreement. According to the *Oxford Advanced Learner's Dictionary of Current English* by AS Hornby, 5th edition, the word "salient" is defined as:

> most noticeable or important; main

and that being the case, it can be said that the terms and conditions as set out in the letter of acceptance constituted the fundamental terms and conditions that would be incorporated in the formal agreement. However, the following words that appear in the letter of offer:

> ... and should there be any queries before the agreement is drafted, please feel free to contact the undersigned.

would, at first blush, indicate an element of uncertainty because the salient points may be subject to "queries" by the plaintiff. But that element of uncertainty was extinguished by the words that were employed in the letter of acceptance, in particular the following words:

> We hereby confirm our acceptance of the offer and our agreement in general to the terms as indicated therein.

and these words by their natural and ordinary meaning meant that the plaintiff agrees in general to the fundamental terms and conditions as set out by the defendant in the letter of offer. In my judgment, the words that were employed in the letter of acceptance rendered the "salient points" as alluded to in the letter of offer to be final and non-negotiable and these "salient points" were accepted by the plaintiff. Adopting an objective approach, the intentions of the parties have been clearly ascertained in consonance with the reasonable expectations of sensible businessmen of the day. There was a valid, legal and binding contract between the parties on the strength of the letter of offer and the letter of acceptance. Now, these two letters must be read and interpreted as a whole in order to extract the meaning behind them. This was also the approach that was adopted by Salmon LJ in *East Ham Corporation v. Sunley* [1965] 1 WLR 30 at p. 43 which was affirmed on appeal *vide* [1966] AC 406 and this was what his Lordship said:

> We have been referred to a number of well-known rules of construction. Many of these rules are artificial, some are contradictory and none is more than a guide, sometimes an uncertain one, for ascertaining the true intention of the parties as expressed in the document under consideration. The principle, however, long ago laid down by Lord Ellenborough CJ in *Barton v. Fitzgerald* [1812] 15 East 530 at p. 541 is of the greatest value. '… the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus* (ie, from what goes before and from what follows); every part of it may be brought into action in order to collect from the whole one uniform and constant sense, if that may be done'.

Lord Davey in *NE Ry v. Hastings* [1900] AC 260 at p. 269 quoted with approval the speech of Lord Watson in *Chamber Colliery Co v. Twyerould* [1893] which was reported in [1915] 1 Ch 268 n at p. 272 and there Lord Davey aptly said:

> The deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible.

and in the context of the present case, I did just that and I gave the meaning to the words employed in the letter of offer and the letter of acceptance without doing violence to the meaning which those words are naturally susceptible to. Of course, the intention of the parties can be discerned not by inferring from the force of a single expression but rather by viewing the whole instrument as a whole. In this context, the speech of Leach VC in *Hume v. Rundell* [1824] 2 S & S 174 at p. 177 would certainly be apt to reproduce:

> In the construction of all instruments it is the duty of the court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument taken together. But a court is not authorised to deviate from the force of a particular expression unless it finds in other parts of the instrument expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every court is bound by it unless it is plainly contradicted by other parts of the instrument.

I am certainly in favour of upholding bargains between the two parties. I have examined the two letters that passed between the two parties and I was unable to find any reason to show that the parties did not intend that there should not be a concluded contract until a formal agreement had been executed by them. Indeed the objective intention of the parties showed that they were bent on entering a concluded contract. Lord Wright in *Hillas & Co, Ltd v. Arcos, Ltd* [1932] All ER (Rep) 494 was in favour of upholding contractual bargains between two parties and this was what his Lordship said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as (a) matter of machinery where the contractual intention is clear but the contract is silent on some detail."

I am in total agreement with the speech of Lord Wright in *Hillas & Co, Ltd v. Arcos, Ltd (supra)* and, for the moment, I have nothing further to add.

It must be recalled that the letter of offer envisaged that "a formal agreement will be signed between" the parties. But this certainly would not prevent a binding contract from coming into force enforceable by this court. The conduct of the parties after the exchange of the two letters positively showed that a valid, legal and binding contract had come into existence. This brings to the forefront the observation of Blackburn J in *Smith v. Hughes* [1861-73] All ER Rep 632, 637 to the following effect:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract

> with him, the man thus conducting himself would be equally bound as if he had intended to agree to that party's terms.

and what his Lordship said, although in the context of a different factual matrix, are certainly germane and can be applied to the present case. In *Smith v. Hughes (supra)*, the judges of the Court of the Queen's Bench (Sir Alexander Cockburn CJ, Blackburn and Hannen JJ) were concerned with the sale of goods where the buyer was under the belief that the goods were of certain quality and the seller too had knowledge of the buyer's belief. Here, the facts were entirely different. Be that as it may, Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd (supra)* was confronted with the issue of a conditional agreement wherein the appellant by way of a conditional letter assigned construction works to the defendant. That letter contemplated execution of a formal contract where the terms and conditions would be incorporated. The formal contract was not executed. The respondent was optimistic about executing a formal contract and in order to expedite performance under that contract, with the knowledge but not at the request of the appellant, went on to engage architects, engineers, etc, and commenced preliminary works on the project. Problems arose between the parties pertaining to the project and on 27 August 1987, while work was still in progress, the appellant wrote to the respondent instructing the respondent to cease all work. This prompted the respondent to institute an action for damages for breach of contract. The trial judge held that there was a binding contract and awarded the respondent the damages applied for. The appellant appealed. The then Supreme Court speaking through Edgar Joseph Jr SCJ was of the view that the conditional letter did not constitute a contract binding in law upon the parties. His Lordship said that that letter was only a record of the terms upon which the parties agreed to form the basis of the negotiation of a contract and that letter was described as a letter of intent. His Lordship was also of the view that the fact that the respondent had, after receipt of the letter, conducted itself as if it considered that a contract binding in law had been concluded, was of no consequence at all. But his Lordship Edgar Joseph Jr SCJ in the course of writing his judgment had this to say, which must surely be of importance and would be applicable to the facts of the present case (see p. 140 of the report):

> True it is that merely because the parties contemplate the preparation of a formal contract that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatz Feldt-Wildenburg v. Alexander* [1912] 1 Ch 284, (ap pp. 288, 289) where the Court said this:
>
> > It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplates the execution of

> a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

In *Branca v. Cobarro* [1947] KB 854, the agreement entered into by the parties contained a clause as follows:

> This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated is signed.

It was held by the Court of Appeal that a binding agreement had come into effect.

I hasten to add that my analysis of the factual matrix of the present case showed that there was indeed a valid, legal and binding contract between the parties.

Conduct Of The Parties

This would certainly be an important indicator as to whether a concluded contract had been entered between the parties. In *Kwek Seow Kee & Anor v. KT Packaging Sdn Bhd (No 1)* [1998] 2 CLJ Supp 472, especially at p. 483 to p. 485, I had occasion to examine the law at some length and this was what I said:

> I have said elsewhere that a contract is an agreement which is legally enforceable in a court of law. It must be viewed objectively. Blackburn J in *Smith v. Hughes* [1871] 1 LR 6 QB 579 applied the objective approach in this way:
>
> > ... If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms ... .
>
> Traditionally the courts, since time immemorial, have required that agreement be demonstrated by an offer made by one party and by a complete acceptance of that offer by the other party. But Lord Denning in *Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965, took the view that the circumstances as a whole should be examined in an attempt

to discover whether the parties considered that there was an agreement. This was what Lord Denning said in that case:

> I have much sympathy with the judge's (Thesiger J) approach to this case. In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co. Ltd v. A.M. Satterhwaite* [1975] AC 154. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and condition printed on the back of them. As Lord Cairns L.C. said in *Brogden v. Metropolitan Railway Co.* [1877] 2 App. Cas. 666: …'there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description.

In *Gibson v. Manchester City Council* [1978] 2 All ER 583 (CA), [1978] 1 WLR 520 (CA), Lord Denning MR adopted the following approach in construing a contract:

> To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the textbooks it has been the custom to do so; but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforward to be binding, then there is a binding contract in law even though all the formalities have not been gone through. For that proposition I would refer to *Brogden v. Metropolitan Railway Co.* [1877] 2 App. Cas. 666.
>
> It seems to me that on the correspondence I have read (and, I may add, on what happened after) the parties had come to an agreement in the matter which they intended to be binding.

The House of Lords rejected Lord Denning's approach and this was what *Lord Diplock* said [1979] 1 All ER 972, at p. 974:

> My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another is not one of these. I can see no reason in

> the instance case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the council to sell the house to Mr. Gibson and an acceptance of that offer by Mr. Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

As can be seen although Lord Diplock rejected Lord Denning's approach in *Gibson v. Manchester City Council 1978 (supra)*, yet ironically Lord Diplock gave his stamp of approval when he said that there may be certain types of contract that did not fit into the normal slots of an offer and acceptance to constitute a contract.

For my part, the law, firstly, as I understand it, adopts an objective theory of contract formation. In practice the law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. The governing criterion is the reasonable expectations of honest men. It simply means this. The yardstick would be the reasonable expectations of sensible businessmen of the day. Secondly, with alacrity, I must say that it is true that the coincidence of offer and acceptance will in the vast majority of cases reflect and represent the mechanism of contract formation. And this is so in respect of a contract alleged to have been made by none other than an exchange of correspondence. It is, however, not so in the case of a contract alleged to have come into existence during and as a result of performance (*Brogden v. Metropolitan Railway* [1877] 2 AC 666; and *New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd* [1974] 1 Lloyd's Rep. 534 at p. 539, column 1; [1975] AC 154 at p. 167 D-E). Thirdly, one must not lose sight of the adage that the transaction is executed rather than executory. This is an important consideration to reckon with as can be seen in *British Bank for Foreign Trade Ltd v. Novimex* [1949] 1 KB 628 at p. 630. Thus, if the transaction has been performed by both sides it would certainly be unrealistic to argue that there was no intention to enter into legal relations. Neither would it be appropriate to say that the contract is void for vagueness or uncertainty. Now, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty. Fourthly, in the event a contract comes into existence during and as a result of performance of the transaction, it will certainly be possible to hold that the contract impliedly and retrospectively cover pre-contractual performance (*Trollope & Colls Ltd v. Atomic Power Construction Ltd* [1963] 1 WLR 333). All said and done, one must not forget the reservations which Lord Wilberforce had in regard to the traditional approach when his Lordship remarked in *New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd (supra)* to the following effect:

> ... English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

I am constrained to say that a contract may be found, as a fact, to be in existence despite the fact that it cannot be analysed precisely into an offer and correspondence acceptance provided that the terms have been fully agreed and executed by the parties.

Evidence was led to show that after the exchange of the two documents - referring to the letter of offer and the letter of acceptance, the plaintiff and/or its employees had moved into the premises of the defendant and forthwith commenced operations on 4 October 1995. In his examination-in-chief, Stephen Loh Chin Hock (PW1) testified as follows:

Q8. Did the plaintiff commence providing the various services at the Club and, if so, can you tell when the Plaintiff commenced providing the same?

A. The Plaintiff duly mobilised the manpower (initially about 6 employees and subsequently this increased to about 11 employees) to run the services offered. This was done about the 4th of October, 1995. We also went ahead and thereafter purchase the necessary equipment to carry out the services we were to offer.

This would be followed by:

Q10. For how long did the Plaintiff continue to provide the services to the Defendant?

A. We provided our services to the Defendant from about the 4th of October, 1995 till about the time the Plaintiff's employees were prevented from entering the Defendant's premises on or about the 19th of May, 1996.

Under cross examination, Stephen Loh Chin Hock (PW1) was asked the following questions and he too ventured to give the answers thereto:

Q: Is it true that prior to October 1995, the plaintiff was operating personal water craft rental services at the beach in front of the Orient Star?

A: Yes, My Lord.
In L18, Q8 shown and your answer was that the plaintiff moved in on 4.10.95 and I now ask:

Q: Did Plaintiff move into the club premises of the defendant with the authorisation of the defendant?

A: Yes, YA. The letter of offer dated 4 Oct 1995 deemed to be the authorisation i.e. D1 and our acceptance dated 5 Oct 1995 as seen at page 22 of L17.

Q: Can you confirm letter dated 5 Oct 1995 as seen at page 22 to page 23 of L17 was written by you to the defendant?

A: Yes, YA.

Continuing under cross examination, Stephen Loh Chin Hock (PW1)'s testimony went like this:

> Witness is asked to read the 2nd paragraph of page 23 of L17 and he does as requested.
>
> Q: How could the plaintiff have moved in onto the defendant's premises with the defendant's authorisation on 4 Oct 1995 when this letter dated 5 Oct 1995 is a letter from you requesting from the defendant authorisation to move in?
>
> A: Following the letter of offer dated 4 Oct 1995 and our acceptance of the condition by letter dated 5 Oct 1995 we were told to immediately mobilise ourselves to start our operations at the Marina. Most of our equipment was already in the district. So it was just a transfer of the equipment into the Marina to start the operation. This we were told to do urgently by the defendant pending a formal agreement to be signed at a later date.

Thus far it would be apparent that the plaintiff provided services at the defendant's LIYC for a continuous period of 4 October 1995 to 19 May 1996. Under re-examination, Stephen Loh Chin Hock (PW1) testified further and his testimony speak a thousand words:

> Upon receipt of D1 at page 19 of L17 – we immediately replied our acceptance and initiated mobilisation of our manpower and equipment to move to the club.
>
> Q: What do you mean by moving into the club?
>
> A: To be ready to offer our services to the general public who uses our club facilities.

And at p. 40 of the notes of evidence, this was what Stephen Loh Chin Hock (PW1) said under re-examination:

> In the physical sense moving into the club meant employing staff, purchasing equipment necessary for the operation of the marina and setting them up for business.
>
> All these done on the verbal instructions of Mr. Lim Say Chong.
>
> D2 page 23 of L17 at para 2 shown and witness said:
>
> I wrote this so that we are fully authorised and the staff of the marina are aware of our presence. But verbally we were instructed to proceed by Mr. Lim Say Chong.

Again under re-examination, Stephen Loh Chin Hock (PW 1) had this to say:

> Despite the verbal instruction I still wrote para 2 of D2 and I am not so sure why I wrote it.

After D2, I did not receive any letter of authorisation from the defendant to move in.

Q: Would you know of any reason as to why such written authorisation was not given?

A: The letter choosing us, appointing us is in fact a letter of authorisation pending an agreement to be signed.

I was operating at the defendant's place close to 10 months. 8 months to be exact. Around 8 months.

During this period of 8 months I was not asked to leave nor was there a threat that I was a trespasser. Therefore I understood the relationship between us to be this: that we are the contractors and the defendant were the owners of the land. All monies due for services rendered were directly collected by the owner.

I will now highlight the evidence of Satwant Singh a/l Hari Singh (PW2) and this was what he said in examination-in-chief:

I verily believe and state that following my employment with the Plaintiff, I was placed by the Plaintiff to carry out my duties at the premises of Lumut International Yacht Club (hereinafter referred to as 'LIYC') between the months of October 1995 until May 1996.

Continuing his oral testimony, under examination-in-chief, Satwant Singh a/l Hari Singh (PW1) testified (see p. 54 of the notes of evidence):

Q: On 4 Oct 1995 did the plaintiff move into the defendant's premises to commence operation?

A: Witness can't answer.

Q: As far as you can remember working with the plaintiff from when to when were you based at LIYC?

A: From Oct 1995 to May 1996.

Q: During this period were you at any point of time asked to leave the premises?

A: Yes.

Q: When was this?

A: This was on 19.5.96.

Q: Before 19.5.96 at any time did anyone from LIYC ask you to leave the defendant's premises?

A: No.

At p. 55 of the notes of evidence, Satwant Singh a/l Hari Singh (PW2) was asked, in examination-in-chief, the following pertinent question and he too gave the answer thereto:

Q: During the period of employment Oct 1995 to May 1996 were you entering the defendant's premises to conduct your job?

A: Yes.

I pause here for a moment. There was a letter from the defendant to the plaintiff dated 15 April 1996 which was marked as exh. "D7" and that letter showed that the plaintiff had provided services to the defendant's LIYC for a continuous period from October 1995 to May 1996. That letter was worded in this fashion:

> I refer to the note that Mr Michael Wan, Operations Manager of Prism Leisure wrote to me dated 11 April 1996. It is with great disappointment that I have to write this reply especially after I have had a whole afternoon meeting on 9 April with Mr Michael Wan.
>
> As mentioned in my memo dated 4 April and as per our discussion on 9 April, I had mentioned that Prism will continue with providing all the services. The only difference is that all enquiries and mechanism pertaining to charges for these services will be handled by the administration office of the LIYC.
>
> If you all could recall, it was my intention from day one for the administration office to handle all charges and not the dockyard office. However, as we felt that since the dockyard office is handling the services, I would like for (them) to try and handle the charges. Unfortunately, over the period I have received numerous comments about charges being levied which are different from what were fixed. There had even been cases when Dockyard office would quote a figure and the LIYC office another. To streamline operations, I then decided to have one source to quote and that is the LIYC office.
>
> There has been no intention to curb the services that the Dockyard office is to provide.
>
> At this juncture, Prism should perhaps go through my letter of offer dated 4 October 1995. It has already been 8 months since the offer was made and I will now like to take liberty to list the areas of responsibility that Prism has yet to fulfill.
>
> Prism is required to provide some vessels for chartering services. Until today there has been none.
>
> Prism is required to provide some essential marina equipment. If these have been provided then Michael's note to me that Prism inability to increase contributions to the LIYC which is owed primarily to absence of basic equipment and amenities should be invalid.

Prism has yet to even get Petronas to talk to me much less to provide the bunkering services.

Most importantly, Prism has yet to get a consultant to set up the operating system and run the club. I would put the inability of Prism to add value to the LIYC as the lack of experience on Prism's part. Even the very basic launching and retrieval of vessels as provided by the Dockyard office have been receiving negative comments.

It appears to me that something drastic have to be implemented to get the place running as it should be and as such I would like to give Prism a week from today to provide me with the information that I had required in my letter dated 4 October 1995 failing which I may have no alternative but to rescind the letter of offer.

The plaintiff replied and that letter was dated 20 April 1996 as seen in exh. "D4" of encl. 17 and it was worded like this:

RE: Your letter ref. TOSL/GC/0109/0496/LSC/ae dated 15th April 1996

We refer to your letter under reference as quoted above addressed to our Chairman, Encik Mohamed Shah bin Tan Sri Abdul Kadir. I have been directed to provide you with this reply.

In reply to the very strongly worded letter, we hope to state herewith our case in the light of your comments regarding our alleged failure to fulfill our responsibilities which we firmly deny, for your consideration:

1. BOATYARD SERVICES
   Your Memo to us dated 4 April 1996 with regards to our responsibilities is very specific and we are sure that we have fulfilled the decision of the management by specifically handling what you have decided.

   We appreciate your confirmation that 'there has been no intention to curb the services that the Dockyard office is to provide'.

2. PROVISION OF VESSELS FOR CHARTERING
   We regret to note that there has been absolutely NO such request of chartering of vessels from any individual or company since the day we started operations at the Marina.

   From day one, we have invested in two crafts, i.e. one 27 foot craft and one 45 foot craft. These crafts are currently in a boatyard in Teluk Intan undergoing refurbishing and rebuilding works. The refurbishing of the 27 foot craft has been completed but we have stopped work on the 45 foot craft due to the fact that there has not even been one such request of a charter. The commissioning of these crafts would further increase our overheads by at least another RM5,000 per month which would include the skipper's salary and cost of upkeep of the crafts.

As per your letter of offer dated 4 October 1995, PRISM is required to give priority to the two crafts that belong to the Company, i.e. 'Orient Star' and the 'Star Express'. The 'Orient Star' which has yet to be operational and is still undergoing repairs, and even with only the 'Star Express', we have not had a single booking for chartering as stated above.

3. EQUIPMENT AND AMENITIES

PRISM have invested time and expense in the necessary equipment and amenities in the Dockyard to carry out the duties as required of us. PRISM have even invested in the purchase of the larger tractor to haul large crafts despite the fact that it was agreed that LIYC would be responsible for this purchase.

The basic amenities and equipment we referred to in our letter of 11 April 1996 refers to the equipment necessary for the organisation of 'water based activities' like dinghies, canoes, sailing crafts, etc. In order that we may organise activities for members, etc. to generate more income for both the LIYC and ourselves.

Further to this there is the necessity for the provision of the hydraulic winch which was the agreed responsibility of the LIYC to properly launch and retrieve crafts from the slipway. Without this, the method of retrieval and launching using a tractor has proven to be dangerous as seen in the incident on 7 April 1996 which you are aware of.

4. BUNKERING

Petronas is fully briefed on the requirements of the LIYC. It is their contention that without the confirmation of the exact site for the storage tanks and the availability of accurate detailed plans, it is impossible for them to design the system that they have initially discussed with senior personnel of your company.

We are given to understand that the current plans of the LIYC that was given to Petronas through us do not include land reclaimed. This has further hampered the design of the system.

Further discussion on this matter pending the availability of the proper plans is premature.

5. CONSULTANT

PRISM's appointed consultant from Hong Kong had paid a visit to the LIYC in November 1995 and given the responsibilities that we are now conducting, his recommendation was that his services was not necessary or required. This visit has cost us well in excess of RM15,000.

Your contention that PRISM is unable to get the consultant to set up an operating system and run the CLUB (is) inaccurate and out of context. It is NOT our responsibility to run the Club as indicated in your letter of offer dated 4 October 1995.

Furthermore, we have been told on many an occasion that the necessity of the services of a consultant was not immediately required and an unnecessary cost.

6. EXPERTISE

We regret your unfair accusation that PRISM 'lacks expertise' and that 'even the very basic launching and retrieval of vessels as provided by the Dockyard Office have been receiving negative comments' is not only injurious but absolutely baseless and without foundation.

We have continuously reminded the Management to enlighten us (on) any area of negativity or the negative comments that the Club has received so that we may improve our services, but to date, we have not received even one such report from your Club. However, there have been numerous complaints against the Club and we have always brought these to your knowledge with the hope that together we may rectify all shortcomings to our mutual benefit.

Unsubstantiated accusations only reflect the lack of professionalism. We suggest that if there is any such negative comment, we should call a meeting of the members to clarify these issues so that we both can gain the knowledge on how we may both serve the members better.

As we have always indicated, we would willingly work with the Management to ensure (that) the LIYC becomes a reputable organisation worth the investment of members. In keeping with our commitments to ensure services were offered the best possible way to members, we have invested in various equipment, employed and trained personnel, as well as continuously consulted with the Management of the Club to ensure smooth operations. We regret that as concessionaires, there have been occasions where our staff have been denied access and not accorded the cooperation from LIYC.

We trust you will reconsider your stand as stated in your letter dated 15 April 1996. We are willing to meet and discuss the abovementioned issues so that an amicable solution may be finalised.

Thank you.

The defendant's witness by the name of Lim Say Chong (DW1) took the stand and under cross examination his evidence went like this (see p. 86 notes of evidence):

Q: Did the plaintiff move their equipment into the LIYC premises between the period of 4 Oct 95 until the plaintiff was allegedly evicted?

A: I knew of some jet skis and vehicles being at LIYC supposedly moved in by the plaintiff. I had no idea if other essential marina equipment had been moved in.

Page 25 of L17 shown to witness - ie, P28 and he says:

Yes, this letter was sent to the plaintiff at their dockyard office at LIYC."

At p. 89 of the notes of evidence, Lim Say Chong (DW1) was cross-examined further:

At page 25 of L17 - P 28, and he is asked:

Q: Who was handling the launch and retrieval services at the dockyard?

A: At that point in time I wasn't sure as to which party was handling the launch and retrieval services.

Q: How many parties were there apart from the plaintiff and the defendant at that point of time?

A: There were 2 parties. They were the defendant and the plaintiff.

I confirmed I issued P28 and it had been sent to the plaintiff.

Put: P28 was sent to the plaintiff?

A: Yes, YA.

Put: The launching and retrieval services were conducted by the plaintiff.

Do you agree with me?

A: No, YA.

This memo dated 4 April 1996 only mentioned of launching and retrieval charges and not launching and retrieval services.

Now, exh. P28 was a memo from LIYC and it can be seen at p. 25 of encl. 17 and it was worded like this:

FROM : Mr LIM SAY CHONG
TO : DOCKYARD SERVICES LIYC
DATE : 4 APRIL 96

SUB : LIYC'S ADMINISTRATION OFFICE

TO AVOID COMPLICATIONS AND FURTHER COMPLAINTS FROM MEMBERS AND NON-MEMBERS USING THE CLUB'S FACILITIES, MANAGEMENT HAS DECIDED THAT WITH IMMEDIATE EFFECT THE DOCKYARD WILL ONLY HANDLE LAUNCH AND RETRIEVAL CHARGES. ALL OTHER CHARGES AND ENQUIRIES REGARDING THESE CHARGES ARE TO BE HANDLED BY THE ADMINISTRATION OFFICE OF THE YACHT CLUB.

ALSO BE INFORMED, THAT ONLY THE PICK UP TRUCK USED BY THE DOCKYARD SERVICES WILL BE ALLOWED AT THE BOAT PARKING AREA. ALL OTHER VEHICLES WILL NOT BE ALLOWED.

PLEASE ADHERE STRICTLY.

REGARDS,
SGD. (ILLEGIBLE).
LIM SAY CHONG
GENERAL MANAGER

All these would show that the plaintiff had rendered their services to the defendant continuously for a period between 4 October 1995 to 19 May 1996. It must be borne in mind that the plaintiff's presence at the defendant's LIYC was pursuant to and within the ambit of a valid, legal and binding contract between the parties thereto. Two significant factors must be highlighted and that would be:

(1) that the defendant during the said period of 4 October 1995 to 19 May 1996 - which came up to approximately eight months, never thought nor consider the plaintiff as a trespasser or an unauthorised entity that operated its business at the defendant's LIYC; and

(2) that the defendant benefited under that arrangement whether it be in the form of monies or otherwise from the services that were provided by the plaintiff for and on behalf of the members of the defendant's LIYC.

It must be recalled that the plaintiff had communicated its acceptance of the defendant's offer in writing and that communication constituted a valid contract (*Mc Iver v. Richardson* [1813] 1 M & S 557; *Mozley v. Tinkler* [1835] 1 CM & R 692; *Ex p Stark* [1897] 1 Ch 575; *Holwell Securities Ltd v. Hughes* [1974] 1 WLR 155, 157; *Allied Marine Transport Ltd v. Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925, 937). In short, an acceptance must be communicated to the offeror (see generally s. 4(2) of the Contracts Act 1950). Thus, there would not be a contract when a person writes an acceptance on a piece of paper and keeps that paper to himself (*Kennedy v. Thomassen* [1929] 1 Ch 426). Similarly, when a company resolves to accept an application for shares but fails to communicate the resolution to the applicant, there would not be a contract in existence (*Best's Case* [1865] 2 DJ & S 650). The offeror must know that his offer has been accepted. It would cause hardship to the offeror to be bound without knowing that his offer had been accepted. Here, the letter of acceptance was in response to the letter of offer and it was communicated to the defendant. That would be sufficient to constitute a valid, legal and binding contract between the parties. This was my judgment and I so hold accordingly.

The Requirement Of Execution Of A "Formal Agreeement"

The courts have always been magnanimous. Even in the absence of a "formal agreement", the courts have ruled that there were concluded contracts between the parties. The courts have on numerous occasions found that the parties were at *consensus ad idem* even though the formal agreements have yet to be executed. I have earlier reproduced passages from the judgment of Edgar Joseph Jr SCJ in the case of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd (supra)* which showed that even though the parties contemplated the execution of a formal contract that would not prevent a binding contract from being in force. In the context of the present case, it was my judgment that the requirement of a "formal agreement" was merely intended as a solemn record of an already complete, valid, legal and binding contract (*Filby v. Hounsell* [1896] 2 Ch 737; *ER Ives Investments Ltd v. High* [1967] 2 QB 379; *Elias v. George Sahely & Co (Barbados) Ltd* [1982] 2 All ER 801; *Damon Cie Naviera SA v. Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 WLR 435; *Clipper Maritime Ltd v. Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep 547; *Malcolm v. Chancellor, Masters and Scholars of the University of Oxford, The Times,* 19 December 1990; *Ateni Maritime Corp. v. Great Marine Ltd (The Great Marine) (No 2)* [1990] 2 Lloyd's Rep 250; *Jayaar Impex Ltd v. Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437; and *Smit International Singapore Pte Ltd v. Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd's Rep 553). Now, by way of an analogy even in the case of a sale of land by way of a private treaty, the agreement although "subject to contract", the courts have construed that the parties have made a binding contract and this can clearly be seen in the case of *Storer v. Manchester CC* [1974] 1 WLR 1403 as well as the case of *Tweddell v. Henderson* [1975] 1 WLR 1496, 1501-1502. In *Rossiter v. Miller* [1878] 3 App Cas 1124, the defendant offered to purchase a piece of land and was told that he must purchase that land subject to certain conditions; his offer remained open and it was accepted "subject to the conditions and stipulations printed on the plan." The House of Lords held that there was a completed contract. Lord Blackburn remarked at p. 1151 that "… the mere fact that the parties have expressly stipulated that there shall be a formal agreement prepared ... does not, by itself, show that they continue merely in negotiation." I reiterate that from the available evidence the intention of the parties can clearly be seen to mean that the execution of a "formal agreement" was merely an expression of the desire of the parties as to the manner in which the transaction which was already agreed upon will go through. This was clearly a case where all the essentials of a contract have been ascertained and determined by the parties prior to the execution of a formal agreement and this court will not hesitate to recognise and enforce such a contract. The speech of Lord Loreburn in *Love And Stewart (Limited) v. S Instone And Co (Limited)* [1917] 33 TLR 475 at p. 476 strikes a chord to the facts of the present case and this was what his Lordship said:

> It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain. But if the intention were that what was agreed in the first instance should be subject to the completion of the formal document, then there was no bargain while that condition remained unfulfilled.

Since all the essentials of the contract have been agreed as contained in the letter of offer and the letter of acceptance culminating in the parties conducting themselves in accordance with their obligations under the contract as seen from the testimony of the witnesses, there was no doubt at all that on the balance of probabilities that a valid, legal and binding contract existed between the parties notwithstanding the failure to execute a formal agreement. At this juncture, it would be germane to refer to the joint judgment of Dixon CJ, McTiernan and Kitto JJ in *Masters And Another v. Cameron* [1954] 91 CLR (Commonwealth Law Reports) 353 especially at p. 360 to p. 362 where their Lordships said:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common. Throughout the decisions on this branch of the law the proposition is insisted upon which Lord Blackburn expressed in *Rossiter v. Miller* [1878] 3 App. Cas. 1124 when he said that the mere fact that the parties have expressly stipulate that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not,

by itself, show that they continue merely in negotiation. His Lordship proceeded: '…as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed' (1878) 3 App. Cas., at p. 1151: see also *Sinclair, Scott & Co. Ltd. v. Naughton* [1929] 43 C.L.R. 310, at p. 317. A case of the second class came before this Court in *Niesmann v. Collingridge* [1921] 29 C.L.R. 177 where all the essential terms of a contract had been agreed upon, and the only reference to the execution of a further document was in the term as to price, which stipulated that payment should be made 'on the signing of the contract'. Rich and Starke JJ observed (1921) 29 C.L.R., at pp. 184, 185 that this did not make the signing of a contract a condition of agreement, but made it a condition of the obligation to pay, and carried a necessary implication that each party would sign a contract in accordance with the terms of the agreement. Their Honours, agreeing with Knox C.J., held that there was no difficulty in decreeing specific performance of the agreement 'and so compelling the performance of a stipulation of the agreement necessary to its carrying out and due completion' (1921) 29 C.L.R., at p. 185: see also *O'Brien v. Dawson* [1942] 66 C.L.R. 18, at p. 31.

Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: *Governor & c. of the Poor of Kingston-upon-Hull v. Petch* [1854] 10 Exch. 610 [156 E.R. 583]. The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in *Summer-greene v. Parker* [1950] 80 C.L.R. 304 or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed. These possibilities were both referred to in *Rossiter v. Miller* [1878] 3 App. Cas. 1124. Lord O'Hagan said: 'Undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made' (1878) 3 App. Cas., at p. 1149. And Lord Blackburn said: 'parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement' (1878) 3 App. Cas., at p. 1152. So, as Parker J. said in *Von Hatzfeldt-Wildenburg v. Alexander*

> [1812] 1 Ch. 284, at p. 289 in such a case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract.
>
> The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape: *Farmer v. Honan* [1919] 26 C.L.R. 183.

Here, the language of the two documents showed the intention of the parties to immediately enter into a concluded contract notwithstanding the absence of the formal agreement. There was evidence that the parties have acted upon the terms of the two documents and this court would be failing in its duty if it does not give effect to the two documents which embody a definite intention that the parties would be bound by the terms as framed in the two documents (*Sweet and Maxwell Ltd v. Universal News Services Ltd* [1964] 2 QB 699; [1964] 3 All ER 30). In a commercial transaction, like the present case, where the parties are engaged in water based activities and where the parties had dealt with each other between 4 October 1995 to 19 May 1996, this court must surely give effect to the two documents because the parties have shown a sufficient intention to be bound by those documents (*Hillas & Co, Ltd v. Arcos, Ltd (supra)*; and *Art-Is At Work Sdn Bhd v. Sony Music Entertainment (M) Sdn Bhd* [2000] 5 CLJ 559).

Defendant's Arguments

It was argued that the plaintiff had failed to provide the details of:

(1) the number of the vessels to be provided by the plaintiff;

(2) the list of equipment;

(3) the curriculum vitae of the Hong Kong consultant; and

(4) the feasibility study of the venture,

as alluded to in the letter of offer, and these failures were said to be fatal as the *consensus ad idem* between the parties had not been established. But these arguments must be assessed in the context of the evidence of Stephen Loh Chin Hock (PW1). At p. 21 of the notes of evidence, under cross examination, Stephen Loh Chin Hock (PW1) testified as follows:

> Q: At page 21 of L17 (D1) under column 'showroom' information was requested by the defendant and so would you agree with me that the plaintiff was to provide certain information to the defendant before (the) parties could reach (an) agreement?

A: No, YA. Some of the answers were also stipulated in our letter dated 5 October 1995 which was one day after the letter of offer was made and as far as we are aware this does not constitute (a) condition and we merely provided the information as requested and we did so the very next day itself.

Continuing further, Stephen Loh Chin Hock (PW1) testified, under cross examination, at p. 22 to p. 23 to the following effect:

Put: That the information requested by the defendant of the plaintiff at page 21 of L17 was fundamental and important information required by the defendant before parties could reach any agreement?

A: No, YA.
The negotiations were based on the conditions as set out in page 19, page 20 and 1st part of page 21 of L17 and these were only additional information that the club wanted of us and we have answered the 3 questions i.e. the number of vessels that Prism will be providing, the list of equipment that was required as well as the name of the consultant that Prism intend to engage.

Put: That D1 was merely a letter from the defendant inviting further discussions and negotiations from the plaintiff?

A: No, I believe the letter is very clear. We were chosen as the concessionaire to run the marinas. 2nd para of D2 at page 22 of L17 read and he is asked:

Q: Would you agree with me that since the plaintiff was to revert to the defendant on the point as alluded to and that items 1 to 4 of page 22 of L17 were still being discussed by the parties?

A: No. Maybe our English is not so good because we don't go to school.

But (what) we wanted to say had been stipulated at the given time. We have tried our best to answer as honestly as we can. Three of the points already answered in D2. The 4th point with regard to the consultant was answered in our letter dated 20 April 1996 as seen at page 29 of bundle L17 at point number 5.

Again under cross examination, Stephen Loh Chin Hock (PW1) testified as follows as seen at p. 35 of the notes of evidence:

Para 4 of page 28 of bundle L17 (D7) – 4th para and also refer to page 21 of L17 in regard to CV of Hong Kong consultant and I ask you.

Q: Did the plaintiff provide the defendant with the name and CV of Consultant from Hong Kong?

A: Yes, but not in writing. When the consultant visited the club in November there were club personnel who may have met him. Upon visiting the marina the proposed consultant declined the job.

Under re-examination, the testimony of Stephen Loh Chin Hock (PW1) went like this (see p. 43 of the notes of evidence):

D1 at page 21 of L 17 shown to witness and under column 'showroom' and he said:

I do not consider the 4 requests under column showroom as fundamental terms of the agreement. As indicated it was meant for information of which points 1 and 2 were answered in our letter dated 5 October 95 (D 2) and point no: 3 was answered in our letter dated 20.4.96 (D 4).

Now, in regard to the feasibility study of the venture, the evidence of Stephen Loh Chin Hock (PW1) on this point went like this (see the cross examination of this witness at p. 21 of the notes of evidence):

Q: When the defendant requested a feasibility study from the plaintiff on the venture with the plaintiff wouldn't it be correct to say that parties were still in the stages of negotiation?

A: No, YA.

The question of feasibility study was already tackled by the Lumut International Yacht Club and we were told not to put up the feasibility study verbally by Mr. Lim Say Chong, the General Manager of Lumut International Yacht Club, Orient Star and Johan Holdings then.

There is no documentary evidence to show that Mr. Lim Say Chong had told me not to prepare the feasibility study.

Under re-examination, Stephen Loh Chin Hock (PW1) testified further (see p. 43 of the notes of evidence):

In regard to the feasibility study, in D1 such a request was made and under cross examination you stated it was not a requirement because Lumut International Yacht Club (LIYC) had tackled the requirement.

The feasibility study done by LIYC was not incorporated as a term in the agreement as per D3.

From my knowledge I believe Mr. Lim Say Chong prepared D3.

It is interesting to note that the services agreement that was prepared by the defendant as seen in exh. "D3" did not incorporate as a term or as a condition the feasibility study of the venture. That being the case it can safely be said that the feasibility study of the venture was not a crucial factor to be considered otherwise it would be incorporated in the services agreement by

the defendant. The sum total of it all would be this. That the issues that were raised by the defendant in the letter of offer were addressed by the plaintiff in the letter of acceptance; and these issues too were not incorporated in the services agreement. Thus, it would be appropriate to say that there was *consensus ad idem* between the parties at the point of time when they exchanged the letter of offer and the letter of acceptance between themselves.

Next, it was argued by the defendant that the issue of income guarantee by a third party would show that there was no *consensus ad idem* between the parties. But the plaintiff argued that the usage of the words "income guarantee" in the letter of offer must be read to mean that the defendant guarantees to the plaintiff that the venture would bring about a monthly income of RM5,000 after three months. It would be germane, at this juncture, to refer to the evidence of Stephen Loh Chin Hock (PW1) at p. 46 of the notes of evidence when he testified under re-examination that:

> Q: At all instances the plaintiff had not changed their mind or given new ideas, am I right to say that?
>
> A: Yes, YA.
> At page 37 of L17 of D3 clause 3.5.2 in regard to guaranteed income, I disputed this clause because we were required to post a 3rd party guarantee to guarantee the income. This is seen at page 38 of L17 at para (iv) thereof.
>
> This clause in regard to the guarantee did not appear anywhere in the letter of offer.

Continuing at p. 51 of the notes of evidence this was what Stephen Loh Chin Hock (PW1) testified under re-examination:

> Q: In general in regard to all these offending clauses what were your reactions?
>
> A: Upon receiving the agreement we conveyed our objections to Mr. Lim Say Chong which resulted in his action to amend the personal guarantee to a corporate guarantee for which we also objected because this was not a negotiated subject from the very beginning or that it was not incorporated in the offer letter.
>
> From the start when we entered the defendant's premises till the time when we left the defendant's premises, I kept up the end of the bargain.

and this showed that the defendant was interested to include the requirement of a third party guarantee in the services agreement - a move to impose a new condition upon the plaintiff, which was vehemently objected to by the plaintiff. In my judgment, on the strength of the letter of offer and the letter of acceptance there was a valid, legal and binding contract in existence

between the parties, which contract was unlawfully terminated by the defendant. It was also part and parcel of my judgment that the plaintiff was unlawfully evicted by the defendant from the defendant's premises at the LIYC.

Reverting back to the requirement of execution of a "formal agreement", I have this to say. That the facts positively point to the proposition that the parties had already entered into a legally binding contract where the execution of a formal agreement was a mere formality based on the conduct of the parties pursuant to the exchange of the two documents between the parties and the fact that the contract had already become an executed contract by the conduct of the parties again pursuant to the exchange of the two documents between the parties. The available evidence too did not evince a situation that the parties intended that their rights and obligations under the two documents should be suspended until the "formal agreement" was finalised and executed. At any rate, even if the defendant intended that its rights and obligations under the two documents should be suspended until the "formal agreement" was finalised and executed, the facts and the evidence as adduced during the trial showed that the proposed draft "formal agreement" in exh. "D3" was only forwarded to the plaintiff by way of a letter dated 26 February 1996 as seen in exh. P10 which was approximately after a period of five months from the time that the plaintiff had commenced providing the services to the defendant. It was part and parcel of my judgment that the defendant's act of allowing the plaintiff to provide the services at the LIYC was indicative of the intention of the parties to enter into a valid, legal and binding contract and that the execution of a "formal agreement" would only amount to a mere formality.

By way of an alternative, the defendant argued that even if there was a valid contract the defendant had lawfully terminated the contract on the basis that the plaintiff had breached the agreement when the plaintiff had failed to address the issues as raised by the defendant in the letter of offer and the plaintiff too had failed to execute a "formal agreement". By way of a rebuttal, the plaintiff submitted that the evidence adduced during the course of the trial showed that the issues as raised by the defendant in the letter of offer were of no consequence as they constituted mere information which the defendant had requested and nothing more. Towards this end, the evidence of Stephen Loh Chin Hock (PW1) under cross examination as seen at p. 21 to p. 23 of the notes of evidence which were reproduced earlier clearly supported the plaintiff's submissions.

The sum total of it all would be this. That the issues raised in the letter of offer were not issues which will go to the root of a valid, legal and binding contract between the parties. Those issues were in fact mere information which the defendant had sought and the failure of the plaintiff to provide that

information was not material and neither would it make the agreement impossible to be performed. On this point, the speech of Gopal Sri Ram JCA in the case of *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 merits reproduction. At p. 295 of the report, his Lordship aptly said:

> Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie, the party who is not guilty of a breach. Where the term has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.
>
> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.

Continuing at p. 296 of the report, this was what his Lordship said:

> In support of the suggested approach we find it necessary to quote from two cases. The first is *Bettini v. Gye* [1876] 1 QBD 183 where, at p. 188, Blackburn J, when applying the test formulated by Parke B in *Graves v. Legg* [1854] 9 Ex. 709, at p. 716 said:
>
> > [I]n the absence of such an express declaration, (that is, an express declaration in the contract of an intention to make the performance of a particular term a condition precedent or not a condition precedent) we think that we are to look to the whole contract, and applying the rule stated by Parke B, to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent. (Emphasis added).

The second is *Wallis v. Pratt* [1910] 2 KB 1003, at p. 1012, where Fletcher-Moulton LJ said:

> A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. (Emphasis added).

Correct Perspective

Between 4 October 1995 to 19 May 1996, the plaintiff and its employees were in possession of the defendant's land and were providing services pursuant to the valid, legal and binding contract at the defendant's LIYC. Being in possession generally means that the plaintiff was in occupation or had physical control of the defendant's land. Possession would certainly vary from case to case and according to Lord Fitzgerald in *Lord Advocate v. Young* [1887] 12 App Cas 544 at 556, "by possession is meant possession of that character of which the thing is capable".

On conversion, Bramwell LJ in *Hiort v. L & NWR* [1879] 4 Ex D 188 succinctly said at p. 194:

> I have frequently stated that I never did understand with precision what was a conversion.

Indeed it would be difficult in the extreme to categorise and list the types of conversion. The difference between conversion and trespass was aptly described by Atkin LJ in *Sanderson v. Marsden and Jones* [1922] 10 LIL Rep 467 at p. 472 in these salient words:

> An act of conversion differs from mere trespass in as much as the former must amount to a deprivation of possession to such an extent as to be inconsistent with the right of the owner and evidence of an intention to deprive him of that right, whereas the latter includes every direct forcible injury or act disturbing the possession of the owner, however slight the act may be.

In the present case, there was evidence that the defendant had forcibly entered the plaintiff's office which was located on the defendant's land and ungraciously had thrown out the various equipment, items and movable properties belonging to the plaintiff. All these acts certainly constituted conversion. In *Kuwait Airways v. Iraqi Airways Co* [1999] CLC 31, the defendants' pilots ferried aircraft expropriated by Iraqi forces from Kuwait to Basra in Iraq and the court held that there was conversion of the aircraft. Even taking a car for a "joy-ride" was held by a New Zealand court to be conversion (*Aitken Agencies Ltd v. Richardson* [1967] NZLR 65). In *Brightside Co-operative Society v. Phillips* [1964] 1 WLR 185, it was held that when the plaintiff alleged the conversion of a number of chattels, it was not necessary to particularise them item by item; a general description of their nature and value was held to be sufficient. Here, the plaintiff in its amended statement of claim had itemised the items and gave value to them. The detention of a chattel must be adverse to the owner who is entitled to possession and when that happens the detention amounts to a conversion (*Clayton v. Le Roy* [1911] 2 KB 1031, 1052) and this was what had happened to the plaintiff here.

Executed Contract

The distinction between the status of an executory contract and an executed contract has been demonstrated by me elsewhere in other judgments. For this exercise, it would be ideal to refer to the decision of Cohen LJ in *British Bank For Foreign Trade, Ltd v. Novimex, Ltd* [1949] 1 All ER 155, where his Lordship delivering the judgment of the Court of Appeal agreed with the law as explained by the trial judge in the person of Denning J (as he then was), and this was what Cohen LJ said (see p. 158 of the report):

> I turn next to the main question. Is this an enforceable agreement? A number of authorities have been cited to us, to which I do not propose to refer in detail, because, in my view, the effect of the authorities is correctly stated in the learned judge's judgment where he says:
>
> > The principle to be deduced from the cases is that, if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then, although, while the matter is still executory there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an

agreement as to the price or the terms, then the law will say that there is necessarily implied from the conduct of the parties a contract that, in default of agreement, a reasonable sum is to be paid.

With that statement of the principle of law I respectfully agree.

Here, the available evidence as adduced showed the existence of an executed contract where the plaintiff had performed its obligations by providing services at the defendant's LIYC and the defendant too had benefited from it.

Conclusion

The law certainly leaned in favour of the plaintiff and I had no choice but to hold that there was a valid, legal and binding contract in existence between the parties and that it was the defendant who had breached that concluded contract. Bargains between the parties should be upheld and not be struck down. The defendant should be held liable to the plaintiff under the terms of the concluded contract as seen in the letter of offer (in exh. "D1") and the letter of acceptance (in exh. "D2"). I found and it was part and parcel of my judgment that:

(1) On 19 May 1996, the defendant by itself, its agents, servants and/or representatives harassed the plaintiff's employees to vacate the defendant's land where the LIYC was located;

(2) On 20 May 1996, the defendant by itself, its agents, servants and/or employees prevented the plaintiff's employees from entering the defendant's land where the LIYC was located;

(3) On 28 July 1996, in breach of the concluded contract, the defendant forcibly entered the plaintiff's office which was located on the defendant's land and threw out the various equipment, items and movable properties belonging to the plaintiff; and

(4) all these acts constituted trespass to and conversion of the plaintiff's goods.

In so far as the plaintiff's claim for general and special damages, loss of profits, exemplary and punitive damages, interest and costs as alluded to in the amended statement of claim dated 2 February 1999 as seen in encl. 16 which naturally flow from the breach of the concluded contract, the deputy registrar has the onerous duty to assess them, according to law.